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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. MATILDE DEFLORES, Defendant and Appellant.	B163926 (Los Angeles County Super. Ct. No. YA 048445)

APPEAL from a judgment of the Superior Court of Los Angeles County. William Hollingsworth, Jr., Judge. Affirmed.

Jeffrey S. Kross, under appointment by the Court of Appeal for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Margaret E. Maxwell, Supervising Deputy Attorney General, Ryan M. Smith, Deputy Attorney General, for Plaintiff and Respondent.

Matilde DeFlores appeals a jury conviction of 17 counts of robbery (Pen. Code, § 211) and seven counts of false imprisonment (Pen. Code, § 236), with true findings of gun use allegations (Pen. Code, §§ 12022.5, subd. (a), 12022.53, subd. (b)), arising out of two separate robberies of clothing factories. The trial court found a prior conviction true and that defendant had served a prior prison term, and sentenced defendant under the Three Strikes law (Pen. Code,[1] §§ 667, subd. (a)-(i), 1170.12, subd. (a)-(d)) to an aggregate term of 106 years, four months.

Defendant contends that there is insufficient evidence of constructive possession to support his robbery convictions arising out of the first robbery and that the trial court erred in failing to adequately define the "possession" element of robbery. He also contends insufficient evidence supports the firearm use enhancements in connection with the first robbery. Lastly, he contends the court erred in denying his motion to strike his prior felony conviction, that the sentence of 106 years constitutes cruel and unusual punishment, and that the trial court erred in imposing consecutive terms on all gun use enhancements. We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. The Quality Knitting Robbery, November 4, 2000 (Counts 1-7, 20-26).

On November 4, 2000, at approximately 11:30 p.m., Charley Leelechat (count 1), a production manager at Quality Knitting's factory in Gardena, California, was at work. The business operates on a 24-hour schedule. Other employees at the factory included Jose Figueroa (count 2), Juan Ramirez (count 3), Mateo Garcia (count 4), Fausto Mendoza (count 5), Jesus Martinez (count 6), and Sergio Gomez (count 7).[2]

A friend of Leelechat, Jayesh Patel, arrived at 11:30 p.m. to visit. When he arrived at Quality Knitting at 11:30, Patel observed someone lurking outside the building. After he visited with Leelechat, as Patel was leaving, a man, identified as defendant, walked up to

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[1] All statutory references herein, unless otherwise noted, are to the Penal Code.

[2] Counts 20 through 26 relate to the false imprisonment of these seven employees.

Leelechat and pointed a gun at his head. Another man with a mask on came up. The men pushed Patel and Leelechat back into the factory. Defendant and the man with the mask forced Leelechat, Patel, and the other employees to lie down. Leelechat's hands were tied behind his back, and the men took his necklace, car keys, and money from his pockets. Leelechat could see them going through Patel's pockets; they took Patel's wallet, cell phone and keys. Several other men came into the factory and helped round up all of the employees and direct them to the bathroom. One man, not defendant, stood guard over the bathroom with a gun. Leelechat could see a man driving a forklift and loading merchandise onto it.

After the men left and Leelechat and the other employees got out of the bathroom, they could see that the factory was a "mess," with the telephone line cut. Approximately $120,000 of fabric was missing. Leelechat's car had been moved to the back of the parking lot. Leelechat's phone was missing from his car, and several items were missing from his office. After the robbery, Leelechat identified defendant for the police from a photograph in the personnel files of Nitex, and from a six-pack prepared by the police. Leelechat had seen defendant at his business a few days prior to the robbery; defendant had been looking for a job. Prior to that time, defendant had worked for Leelechat at Nitex, located in Vernon.

Jesus Martinez worked as a mechanic supervisor at Quality Knitting, and at the time of the robbery was working on a machine. He looked up and saw Leelechat and five other people on the floor, and saw a person with a mask going to other machines. Defendant came over and found Martinez at his machine. Martinez recognized defendant from Nitex, where Martinez was responsible for hiring. Martinez was ordered to the ground and tied up. Martinez's wallet was taken; he observed the men taking items from other people on the ground. After the robbery, Martinez found that his car had been moved so that a truck could be driven inside the factory.

Mateo Rodriguez was working on a machine at Quality Knitting at the time of the robbery. He saw Leelechat and the two men, but could not see if the either of the men had weapons. He was ordered to lie on the ground and tied up. Nothing was taken from his pockets. Rodriguez knew defendant from before the robbery because they had worked together, and at trial he identified defendant as one of the robbers. He was ordered into the

bathroom with the other employees. One of the robbers guarded the bathroom by pointing a gun at it.

B. The Shinex International Robbery, April 18, 2001 (Counts 8-17).[3]

Luis Diaz (count 8) worked as a supervisor at Shinex International, an industrial laundromat. At 11:30 p.m. on April 18, 2001, he was working the night shift with Ricardo Thop (count 9), Romero Alvera (count 10), Augustine Alvarado (count 11), Martin Rodriguez (count 12), Pedro Hernandez (count 13), Fernando Tepox (count 14), Ricardo Gomez (count 15), Rinaldo Osorio (count 16), Antonio Presencion (count 17), and Rudy Sazo. A man entered the business and pointed a shotgun at him. He ordered Diaz and his coworkers over by the wall, where they stood for two and one-half hours facing the wall. Two other men were inside with guns. Later, the employees were tied up and put on the floor. One of the men took Diaz's keys. Diaz identified defendant as the man with a shotgun.

At the time of the robbery, Ricardo Thop was counting pants; there were three other workers in his area. He saw his co-workers crouch down, and they pointed behind him. Defendant, who had a shotgun, told Thop to get down on the floor. Thop saw defendant round up the other employees, and defendant and another man ordered them to stand in front of a wall. The employees were tied up and told to get on the floor. They heard a forklift being operated, but nothing was stolen from Thop or his co-workers.

The jury found defendant guilty of robbery on counts 1 through 17 and false imprisonment on counts 20 through 26, and found the gun use allegations true. The court found true the allegations that defendant had suffered a prior serious felony conviction in 1998 for a carjacking, and that he had served a prior prison term. Defendant filed a written motion under section 1385, requesting the court to strike his prior carjacking conviction, and submitted on his written motion. At defendant's sentencing hearing, the court acknowledged defendant's written motion, but did not expressly rule on the motion, instead stating that

[3] The jury acquitted defendant of two counts in connection with a third robbery (counts 18 and 19).

defendant's conduct in the instant case was "really bad." The court imposed an aggregate sentence of 106 years, four months, as follows: On count 1, three years, doubled to six years plus a consecutive 10 years based on the firearm use enhancement under section 12022.53, subd. (b); on counts 2 through 17, two years each, plus three years, four months for the firearm enhancement, plus an additional five years based on defendant's prior, to run consecutively. The court stayed the term imposed on counts 20 through 26 pursuant to section 654.

DISCUSSION

I. SUFFICIENT EVIDENCE SUPPORTS A FINDING OF CONSTRUCTIVE AND ACTUAL POSSESSION OF THE STOLEN PROPERTY.

Defendant argues that there is insufficient evidence to support a finding that he took personal property from the actual or constructive possession of the victims of the robberies in counts 2, 3, 4, 5, 7 (Quality Knitting) and counts 9, 10, 11, 12, 13, 14, 15, 16, and 17 (Shinex International). Instead, the evidence only establishes that personal property was taken from the actual possession of victims Leelechat (count 1) and Martinez (count 6). Furthermore, he asserts that insufficient evidence supports the other counts based on constructive possession of the factories' stolen property because there is no evidence the employees had "sufficient representative capacity with respect to the owner of the property, so as to have express or implied authority over the property." (*People v. Frazer* (2003) 106 Cal.App.4th 1105, 1115.) Based upon *Frazer,* Defendant complains that the evidence does not establish the employees' "job functions" with sufficient particularity to support constructive possession because constructive possession cannot be founded on employee status alone, but requires a showing of "express and implied authority" on the part of the employee over the property. We reject defendant's arguments.

A robbery is defined as "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211; *People v. Nguyen* (2000) 24 Cal.4th 756, 761.) The victim's possession need not be exclusive; it can be actual or constructive. (*People v. Galoia* (1994) 31 Cal.App.4th 595, 597.) When force or fear is used to take property jointly possessed by

two or more persons, the robber may be convicted of a separate robbery for each victim to whom force or fear was applied. (*People v. Marquez* (2000) 78 Cal.App.4th 1302, 1308.)

Constructive possession exists where an individual who does not own or have actual physical possession of the property has the right to control the property. (*People v. Jones* (1996) (*Jones I*) 42 Cal.App.4th 1047, 1052, fn.3.) In *Jones I*, several employees (including two managers and a truck driver) of the Contractor's Warehouse were at the cash registers when they were robbed of the store's cash by two men armed with handguns. (*Id.* at p. 1050.) *Jones I* held that the employees had sufficient "representative capacity with respect to the owner of the property" to be the victims of robbery. (*Id.* at p. 1054.) *Jones I* relied on authority holding that robbery is an offense against the person, and "thus a store employee may be the victim of a robbery even though he is not its owner and not at the moment in immediate control of the stolen property." (*People v. Miller* (1977) 18 Cal.3d 873, 880.)

In *People v. Jones* (2000) 82 Cal.App.4th 485 (*Jones II*), the court reiterated that "California follows the long-standing rule that the employees of a business constructively possess the business owner's property during a robbery." (*Id.* at p. 490.) In *Jones II,* the administrative office of a Kmart staffed by several managerial employees and other workers was the victim of an attempted robbery by two men. (*Id.* at pp. 487-489.) In upholding the defendant's conviction for attempted robbery, *Jones II* found that "[a]lthough none of [the] employees had Kmart cash within their immediate control or possession, this is not a critical factor." (*Id.* at pp. 491-492.) Rather, the employees had a "representative capacity to Kmart and a sufficient possessory interest in their employer's property to be the victims" of the attempted robbery. (*Id.* at p. 492.)

In *People v. Nguyen, supra,* 24 Cal.4th 756, a computer assembly business was robbed of computer equipment during an employee birthday party; present as a visitor was the husband of one of the employees. (*Id.* p. 758.) In finding that the husband could not be the victim of a robbery, *Nguyen* expressly rejected the holding of *People v. Mai* (1994) 22 Cal.App.4th 117. In *Mai,* the court held that a visitor could be the victim of an attempted robbery, eliminating the requirement of possession, because "once force and fear were applied to him in an attempt to deprive someone, or anyone, of property, [the nephew]

became the victim of an attempted robbery. . . . The victim need not own, possess, or even have the right to possess the property sought by the perpetrator." (*Id.* at p. 129.)

Nguyen rejected *Mai* on the grounds that it "dispensed entirely with the requirement that a robbery victim be in possession of the property taken by the defendant. It has been settled law for nearly a century that an essential element of the crime of robbery is that property be taken from the possession of the victim." (*People v. Nguyen, supra,* 24 Cal.4th at p. 762.) *Nguyen*, however, clearly affirmed the doctrine of constructive possession by employees, citing with approval, among other cases, *Jones I.* (*People v. Nguyen, supra,* 24 Cal.4th at p. 761.)

More recently, in *People v. Gilbeaux* (2003) 111 Cal.App.4th 515, four employees of a Food 4 Less and two janitors who were not Food 4 Less employees were robbed at gunpoint. *Gilbeaux* found the two janitors had constructive possession of the store's property sufficient to uphold a robbery conviction based upon the fact they regularly cleaned the store and had access to its entire premises. (*Id.* at pp. 522-523.) "They were part of the group of workers in charge of the premises at the time of the robbery. . . . [T]hey had a special relationship with Food 4 Less that made them akin to employees . . . [and] [t]he janitors were servants or agents of Food 4 Less for the purpose of the robbery." (*Id.* at p. 523.)

People v. Frazer, supra 106 Cal.App.4th 1105, represents the first time a court required a fact-based circumstances test to determine whether an employee had constructive possession. (*Frazer, supra,* 106 Cal.App.4th at 1115.) In *Frazer,* two Kragen Auto Parts stores were robbed while staffed by a manager and several other employees. (*Id.* at pp. 1109-1110.) Rather than find constructive possession based upon employee status alone, *Frazer* inserted the additional condition that "the proper standard to determine whether a robbery conviction can be sustained as to an employee who does not have actual possession of the stolen property is whether the circumstances indicate the employee has sufficient representative capacity with respect to the owner of the property, so as to have express or implied authority over the property." (*Id.* at p. 1115.) *Frazer* reasoned that "[g]iven our Supreme Court's reiteration in *Nguyen* of the importance of the element of possession to support a robbery conviction, we conclude a fact-based inquiry regarding constructive

possession by an employee victim is appropriate." (*Id.* at p. 1115.) Thus, *Frazer* found that for purposes of clarity, an appropriate instruction would have included the direction that "possession can include constructive possession based on the *right to control* rather than direct physical control at the moment." (*Id.* at p. 1117.)

We reject *Frazer's* analysis because it is inconsistent with *Nguyen's* approval of the well-established principle that employees in general have a sufficient representative capacity vis-à-vis their employers to have constructive possession of their employer's property. (See *Jones I, supra,* 42 Cal.App.4th at p. 1054; *Jones II, supra,* 82 Cal.App.4th at p. 490.) The "representative capacity" referenced in those cases and cases following them is not actual or implied authority over the goods, but a possessory interest emanating from the employee's relation to the business. Given that relationship, the distinction between the employee and the visitor is one of function, rather than physical control.[4] Thus, in the instant case, we find all of the robbery victims, who were employees of the establishments robbed and at the premises performing their job functions, had control of the property or the right to control it, and hence constructive possession of the factories' property for purposes of satisfying the requirements of section 211.

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[4] A similar rationale applies to "good Samaritan" cases, which hold that a person who assists a robbery victim does not have constructive possession of the victim's property. (See, e.g., *People v. Sykes* (1994) 30 Cal.App.4th 479, 484; *People v. Galoia, supra,* 31 Cal.App.4th 595, 598.) *Sykes,* which involved a bystander who attempted to thwart the theft of a saxophone from the victim's music store, did not involve constructive possession because the bystander did not own the premises, and did not have any special obligation to protect the owner's goods. (*Sykes, supra,* at p. 484.) *Sykes* expressly rejected the argument that constructive possession existed because the bystander, who happened to be the security guard of a neighboring store, "sought to retrieve it on the owner's behalf." (*Id.* at p. 481.) In *Galoia,* the bystander had a video concession inside a convenience store that he was servicing when the robbery took place. (*Galoia, supra,* 31 Cal.App.4th at pp. 596-597.) The bystander did not qualify as a victim, although he attempted to apprehend the robber, because he was not responsible for the security of the items stolen, nor did he have a "legally recognized interest in or right to control store property." (*Id.* at p. 598.)

II. THE TRIAL COURT ADEQUATELY DEFINED "POSSESSION."

Building on his *Frazer* argument, defendant contends that the trial court failed to adequately define "possession" because it should have given an instruction based upon *Frazer* that "the proper standard to determine whether a robbery conviction can be sustained as to an employee who does not have actual possession of stolen property is whether the circumstances indicate the employee has sufficient representative capacity with respect to the owner of the property, so as to have express or implied authority over the property." (*People v. Frazer, supra,* 106 Cal.App.4th at p. 1115.) We disagree because, as we have held, we decline to follow *Frazer*. The jury was properly instructed in this case with CALJIC No. 9.40 (elements of robbery) and CALJIC No. 1.24 (actual and constructive possession)[5].

III. SUFFICIENT EVIDENCE SUPPORTS THE FINDING OF PERSONAL FIREARM USE.

Defendant contends that insufficient evidence supports the finding he personally used a firearm in counts 20 through 26, which involved the false imprisonment of the Quality Knitting employees in the bathroom, because the trial testimony established that defendant's accomplice, rather than defendant, guarded the employees in the bathroom. Defendant points out that the prosecution argued in closing that counts 20 through 26 expressly related to the victims' confinement in the bathroom; in addition, the jury requested additional instructions on "aiding and abetting" before it reached a verdict on the false imprisonment counts.

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[5] CALJIC No. 1.24 defines "possession" as follows: "There are two kinds of possession: actual possession and constructive possession. [¶] Actual possession requires that a person knowingly exercise direct physical control over a thing. [¶] Constructive possession does not require actual possession but does require that a person knowingly exercise control over or the right to control a thing, either directly or through another person or persons. [¶] One person may have possession alone, or two or more persons together may share actual or constructive possession."

A firearm use enhancement requires a showing that defendant personally used a firearm in the commission of a crime. (Pen. Code, 12022.5, subd. (a); *People v. Runnion* (1994) 30 Cal.App.4th 852, 855.) Section 1203.06, subdivision (b)(3) provides that personal use of a firearm is "to display a firearm in a menacing manner, to intentionally fire it, or to intentionally strike or hit a human being with it." (§ 1203.06; see also *People v. Johnson* (1995) 38 Cal.App.4th 1315, 1319.) This definition is incorporated into CALJIC No. 17.19, the instruction given in the instant case.[6] (*Johnson, supra,* at p. 1319.)

"False imprisonment is the unlawful violation of the personal liberty of another." (§ 236.) Personal liberty is violated where the victim is "compelled to remain where he does not wish to remain or to go where he does not wish to go." (*People v. Haney* (1977) 75 Cal.App.3d 308, 313; *People v. Reed* (2000) 78 Cal.App.4th 274, 280.) "It is the restraint of a person's *freedom of movement* that is at the heart of the offense of false imprisonment. . . ." (*Reed, supra,* at p. 280.) In *Reed,* a false imprisonment conviction was upheld where the victims were directed at gunpoint to lie down on the floor. (*Id.* at p. 281.)

Defendant's arguments are therefore unavailing to the extent they rely on the bathroom confinement to support the false imprisonment finding. As the evidence establishes, defendant ordered at gunpoint the victims of counts 20 through 26 to lie down on the floor and confined them in this position until he and the other men decided to move the victims into the bathroom while they emptied the factory of inventory. The victims' confinement on the floor, at gunpoint, is sufficient to support defendant's personal use finding.

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[6] CALJIC No. 17.19 states in relevant part that "[t]he term 'personally used a firearm,' as used in this instruction, means that the defendant must have intentionally displayed a firearm in a menacing manner, intentionally fired it, or intentionally struck or hit a human being with it."

IV. NO SENTENCING ERRORS.

A. No Abuse of Discretion in Failing to Strike Prior Conviction.

Defendant argues that the trial court abused its discretion under section 1385 in failing to strike his prior carjacking allegation because the record does not contain any facts regarding that conviction, and in any event, he received three years probation for the crime. On the other hand, he contends the facts in the instant case show that he did not fire the gun or cause physical injury to any of his victims.

As a threshold issue, respondent contends that this claim is not cognizable on appeal because a defendant has no right to make a motion under section 1385, and the trial court is not required to explain its decision; hence, if the court does not exercise its discretion, no appellate review is available. (*People v. Benevides* (1998) 64 Cal.App.4th 728, 734-735; but see *People v. Myers* (1999) 69 Cal.App.4th 305, 309 [review of *Romero* ruling available].)

In *Benevides,* the court held that no appeal lies where the court declines to exercise its discretion under *Romero*, because a defendant has no right to bring a motion under section 1385, and cannot complain of an order denying that which he had no right to request. (*People v. Benevides, supra,* 64 Cal.App.4th at pp. 734-735.) We reject respondent's contention based on the analysis in *People v. Gillispie* (1997) 60 Cal.App. 4th 429, 432-434 and *People v. Myers*, *supra,* 69 Cal.App.4th at pp. 309-310, which held that a trial court's decision not to strike a prior conviction is an exercise of its discretion, and therefore may be reviewed by this Court on appeal. "The fact that an action is taken on the court's own motion does not preclude the possibility of error appearing on the record." (*Gillespie, supra,* 60 Cal.App.4th at p. 433.)

On the merits, the law is well settled that a trial court may exercise its discretion to strike a prior conviction in furtherance of justice. (Pen. Code, § 1385, subd. (a);[7] *People v.*

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[7] Section 1385 provides in relevant part at subdivision (a) that "[t]he judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons for the dismissal must be set forth in an order entered upon the minutes."

Superior Court (Romero) (1996) 13 Cal.4th 497, 529-530 (*Romero*); *People v. Williams* (1998) 17 Cal.4th 148, 151-152.) "[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law . . . or in reviewing such a ruling, the court . . . must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the [Three Strikes] scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*Williams,* at p. 161.)

Here, we find no abuse of discretion. "'The striking of a prior serious felony conviction is not a routine matter. It is an extraordinary exercise of discretion, and is very much like setting aside a judgment of conviction after trial.' [Citation.]" (*People v. McGlothin* (1998) 67 Cal.App.4th 468, 474.) It is a conclusion "that an exception to the [sentencing] scheme should be made because, for articulable reasons which can withstand scrutiny for abuse, this defendant should be treated as though he actually fell outside the Three Strikes scheme." (*Ibid*.) We review the trial court's ruling for an abuse of discretion. (*People v. Garcia* (1999) 20 Cal.4th 490, 503; *Romero*, *supra*, 13 Cal.4th at p. 530.)

Here, there is nothing to indicate that defendant is "outside the scheme" of the Three Strikes law to justify the striking of his prior conviction. On the contrary, defendant has demonstrated a willingness to engage in more serious crimes against the person since his prior conviction. Defendant's prior conviction was a carjacking; the current conviction was for 17 counts of robbery at two business establishments involving the use of firearms. This escalation establishes defendant's disregard for the safety and property of others, and brings him squarely within the group of offenders whom the Three Strikes law targets.

B. Cruel or Unusual Punishment.

Defendant argues his sentence of 106 years to life constitutes cruel and unusual punishment under the California and U.S. Constitutions because his sentence exceeds that imposed upon first degree murder without special circumstances, aggravated sex crimes, or

crimes in which the defendant discharges a firearm or causes great bodily injury, and thus is an extreme sentence that is grossly disproportionate to the crime. (See *People v. Dillon* (1983) 34 Cal.3d 441; *In re Lynch* (1972) 8 Cal.3d 410; *Solem v. Helm* (1982) 463 U.S. 277; *Ewing v. California* (2003) 538 U.S. 11, 123 S.Ct. 1179.) We disagree.

To determine whether a lengthy prison sentence constitutes cruel or unusual punishment, federal and state courts consider whether the sentence is proportional to the crime committed.[8] (*People v. Weddle* (1991) 1 Cal. App.4th 1190, 1193-1197.) In making this analysis, the federal Constitution requires no intercase proportionality review, and considers intracase review appropriate only in rare cases where the sentence was grossly disproportionate to the crime.[9] (See *People v. Weddle, supra,* 1 Cal.App.4th at pp. 1194-1195 [analyzing holding of *Harmelin v. Michigan* (1991) 501 U.S. 957]; *Ewing v. California, supra,* 538 U.S. at pp. 22-23, 123 S.Ct. 1179, 1186-1187.) California courts apply intracase proportionality review to determine whether a sentence is unconstitutionally excessive, defined as "'so disproportionate . . . that it shocks the conscience and offends fundamental notions of human dignity." (*People v. Weddle, supra*, 1 Cal.App.4th at p. 1197; *People v. Dillon* (1983) 34 Cal.3d 441, 478; *In re Lynch* (1972) 8 Cal.3d 410, 424.) The California Supreme Court has declined to find that comparative, intercase proportionality review is required under the state constitution. (*Weddle*, at pp. 1196, 1198, fn. 8; see also *People v. Stone* (1999) 75 Cal.App.4th 707, 715.)

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[8] The California constitution prohibits "cruel or unusual punishment," while the federal constitution prohibits "cruel and unusual punishment," requiring separate analysis under both constitutions. (*People v. Anderson* (1972) 6 Cal.3d 628, 636-637.)

[9] Proportionality may be tested in two ways: intracase and intercase. (*People v. Weddle,* 1 Cal.App.4th at pp. 1194-1195.) Intracase proportionality review considers the nature of the crime and its perpetrator; intercase review compares the relative severity of the sentence at issue to those given for other crimes in the same jurisdiction or for similar crimes in other jurisdictions. (*Id.* at p. 1194, fn. 2.)

Under the California constitution, to measure the proportionality of defendant's sentence, our intracase review considers the nature of both the offense and the offender. (*People v. Dillon, supra*, 34 Cal.3d at p. 479.) *Lynch* required courts to (1) examine the nature of the offender, (2) compare the punishment with the penalty for more serious crimes in the same jurisdiction, and (3) compare the punishment with the penalty for more serious crimes in other jurisdictions. (*Id.* at pp. 425-427.) *Dillon* interpreted the *Lynch* factors to require an examination of the entire circumstances of: the crime, including motive, method, results, and the extent of the defendant's involvement; and of the criminal, including his age, prior criminality, personal characteristics, and state of mind.[10] (*Dillon, supra,* 34 Cal.3d at p. 479.)

In *People v. Ingram* (1995) 40 Cal.App.4th 1397, overruled on another point in *People v. Dotson* (1997) 16 Cal.4th 547, 560, fn. 8, the court considered the first *Lynch* factor and found imposition of a 61-year-to-life sentence under Three Strikes for a 30-year old offender convicted of two counts of residential burglary was not cruel and unusual where there had been three prior convictions of residential burglary. (*People v. Ingram, supra,* at pp. 1414-1416.) The court rejected the defendant's contentions that his crimes (the victims were not at home, but defendant was armed with a knife) were committed in a manner to minimize danger to the victims. (*Id.* at p. 1415.) Noting that "[s]ociety's interest in deterring criminal conduct or punishing criminals is not always determined by the presence or absence of violence[,]" *Ingram* concluded that "[f]undamental notions of human dignity are not offended by the prospect of exiling from society those individuals who have proved themselves to be threats to the public safety and security. Defendant's sentence is not shocking or inhumane in light of the nature of the offense and offender." (*Id.* at p. 1416.)

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[10] The continued usefulness of the second and third prongs of the *Lynch* analysis is questionable, because the California Supreme Court has indicated that all that is required is "intracase" review, i.e., an evaluation of whether the sentence is "grossly disproportionate" to the offense. (See, e.g., *People v. Bradford* (1997) 15 Cal.4th 1229, 1384; see also *People v. Barnett* (1998) 17 Cal.4th 1044, 1182.)

Furthermore, under the second *Lynch* factor, the defendant's crime could not be compared to a first degree murder because the maximum sentence for first degree murder, the death penalty, exceeded that for first degree burglary. Second, *Ingram* noted that "[t]he seriousness of the threat a particular offense poses to society is not solely dependent upon whether it involves physical injury." (*Id.* at p.1416.) Thus, commission of a single act of murder could not be compared with defendant's multiple residential burglaries. (*Id.* at p. 1416; see also *People v. Martinez* (1999) 71 Cal.App.4th 1502, 1512 [recidivist defendant's comparison to first time offender inapt].)

Ingram concluded its analysis of the three *Lynch* factors by noting that the defendant had provided no comparison of recidivist statutes in other jurisdictions. "We simply note California's Three Strikes scheme is consistent with the nationwide pattern of substantially increasing sentences for habitual offenders." (*People v. Ingram, supra,* at p. 1416; see also *People v. Martinez, supra,* 71 Cal.App.4th at pp. 1512-1513 [comparing other state statutes].) *Martinez* concluded that although California's recidivist scheme was one of the most extreme in the nation, this result did "not compel the conclusion that it is unconstitutionally cruel or unusual. This state constitutional consideration does not require California to march in lockstep with other states in fashioning a penal code. . . . Otherwise, California could never take the toughest stance against repeat offenders or any other type of criminal conduct." (*People v. Martinez, supra,* at p. 1516.)

Upon review of these factors, we conclude that defendant's sentence was not so disproportionate as to shock the conscience or offend fundamental notions of human dignity, although defendant did not actually discharge the firearm at either robbery or physically harm his victims. Defendant, a recidivist with a record of carjacking, has proved himself to be a threat to public safety and security. (See *People v. Cooper* (1996) 43 Cal.App.4th 815, 826.) Under *Dillon*, his wanton disregard for human life, demonstrated by his use of a firearm at both factories on multiple victims in each instance, weighs in favor of the severe sentence mandated by statute. (See *People v. Young* (1992) 11 Cal. App.4th 1299, 1309-1310.)

Turning to federal constitutional standards, the U.S. Supreme Court has held that the Three Strikes law, which punishes offenders for their recidivism along with their most recent criminal conduct, does not violate the federal Constitution's prohibition against cruel and unusual punishment. (*Ewing v. California, supra*, 538 U.S. at pp. 27-28, 123 S.Ct. at pp. 1189-1190.) Federal courts defer to state legislatures' rational decisions to use lengthy prison sentences to incapacitate repeat offenders with records of violent or serious felonies, and California courts have long upheld as constitutional laws imposing stricter sentences on recidivists and lengthy sentences tantamount to life sentences without possibility of parole. (*Ewing, supra,* at p. 14.)

In *Ewing,* the United States Supreme Court ruled that a sentence of 25 years to life for a third-striker who stole three golf clubs, did not constitute cruel and unusual punishment under the Eighth Amendment. "Ewing's is not 'the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.'" (*Ewing v. California, supra*, 538 U.S. at p. 30; *Lockyer v. Andrade* (2003) 538 U.S. 63 [123 S.Ct. 1166, 1169-1170, 1175- 1176].) The Supreme Court has also found not grossly disproportionate a life sentence without possibility of parole for possession of 672 grams of cocaine, where the defendant had no prior criminal record. (*Harmelin v. Michigan, supra*, 501 U.S. at pp. 961, 996-997.) If these sentences are not grossly disproportionate under the Eighth Amendment, neither is defendant's 106-year sentence for 17 counts of armed robbery arising out of two separate incidents, both following an earlier serious felony.[11] (See *People v. Cooper*, *supra*, 43 Cal. App.4th at p. 823.)

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[11] Defendant's invocation of *Solem v. Helm, supra,* 463 U.S. 277, is unavailing. Helm, like defendant, was a recidivist, but his triggering offense of passing a bad check for $100 was relatively passive and minor, and his prior offenses also were all relatively minor and nonviolent. (*Id*. at pp. 296-297.) The Supreme Court found a life sentence without possibility of parole grossly disproportionate on these facts. (*Id*. at p. 303.) Defendant, by contrast, committed multiple serious offenses on separate occasions to trigger stricter punishment for recidivism, and his prior record included a serious and violent offense.

C. Consecutive Term on Gun Use Enhancements.

Defendant argues that the trial court erred in imposing consecutive sentences on the gun use enhancements under section 12022.53, subdivision (b).[12] (*People v. King* (1993) 5 Cal.4th 59, 79; Cal. Rule Ct. 4.425.[13]) He contends the factors set forth in Rule of Court 4.425 militate in favor of concurrent terms because the crimes were not independent of each other and the firearm was used with a single objective, to quell the resistance of the victims. We disagree.

In *King,* the court held that a firearm use sentence enhancement under section 12022.5 may be imposed for each separate offense for which the enhancement is found true, even where multiple crimes are committed on one occasion. (*People v. King, supra,* 5 Cal.4th at p. 79.) *King* reasoned that there should be no distinction between a defendant who victimizes several persons at once and a defendant who commits sequential crimes. *King* reversed long-standing prior precedent[14] which had held that only one firearm enhancement could be imposed per incident. (*Id.* at pp. 72-75; see also *In re Tameka C.* (2000) 22 Cal.4th 190, 196-197.) Thus, "[u]nder the *King* rationale, a robber who enters a convenience store

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[12] Section 12022.53, subdivision (b), provides in pertinent part, "[n]otwithstanding any other provision of law, any person who is convicted of a felony specified in subdivision (a), and who in the commission of that felony personally used a firearm, shall be punished by a term of imprisonment of 10 years in the state prison, which shall be imposed in addition and consecutive to the punishment prescribed for that felony."

[13] California Rule of Court 4.425 provides that "[c]riteria affecting the decision to impose consecutive rather than concurrent sentences include: [¶] (a) Facts relating to the crimes, including whether or not: [¶] (1) The crimes and their objectives were predominantly independent of each other. [¶] (2) The crimes involved separate acts of violence or threats of violence. [¶] (3) The crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior." Rule 4.425 also permits the court to consider any other aggravating circumstance, but the factor may not be used to impose the upper term, enhance the sentence, or if it is an element of the offense. (Cal. Rule. Ct. 4.425, subd. (b).)

[14] *In re Culbreth* (1976) 17 Cal.3d 330.

and obtains the valuables of seven patrons with a single display of a firearm has committed seven robberies, and each felony is subject to enhancement for use of a firearm." (*In re Tameka C., supra,* at p. 196.) In *People v. Mason* (2002) 96 Cal.App.4th 1, 12, the court held that *King* applied to enhancements imposed under section 12022.53.

King and its progeny clearly indicate that multiple gun use enhancements may be imposed even where the gun use results from a single transaction involving multiple victims. Thus, although the trial court had discretion not to impose enhancements for each robbery victim, the court did not abuse its discretion in imposing consecutive sentences in the instant case where defendant terrorized the employees at each factory, ordering them to lie on the floor at gunpoint, while some of the victims were personally robbed and the factories' inventories were taken.

DISPOSITION

The judgment of the superior court is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ZELON, J.

We concur:

PERLUSS, P. J.

WOODS, J.